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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 256.

FRANK B. KILLIAN & COMPANY,

Petitioner,

vs.

ALLIED LATEX CORPORATION AND HOWARD G. STRAUSS,

Respondents.

PETITIONER'S REPLY

to

Respondents' Brief Opposing Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

BLYTHE D. WATTS,
MORRIS HIRSCH,
Counsel for Petitioner.

GEORGE H. DESSION,
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It is not true, as stated on page 2 of respondents' brief, that petitioner "bases its whole petition" on the Court of Appeals' statement quoted by respondents. Page 2 of the Petition for Rehearing asserted that the Court below had held the patents invalid because petitioner had not proved that the prior patents were "widely known in the art" and referred to pages 7, 10 and 12-15 of the Petition for Writ where that ground was set out at greater length.

Respondents' attempted distinction between this case and the case of *Landis Mach. Co. et al. v. Parker-Kalon Corp. et al.*, 190 F. (2d) 543 is also incorrect. Respondents say that in the latter case the Court of Appeals "had expressed some doubt as to the validity of the claims in suit" but that in the instant case the Court entertained "no doubt on the score of invalidity." The language used by the Court in these two cases discloses respondents' error in this regard.

In the *Landis* case the Court said at page 547:

"All that was needed was, either some acquaintance in detail with Hanson, or more persistence in experimenting to overcome what Reimschissel too readily assumed to be an insurmountable obstacle. For these reasons we are not satisfied that the claims in suit are valid; indeed on this record we think them invalid."

In the instant case the Court said at page 831:

"All that was needed was to stop the repetition of the 'process' of imposing 'layer upon layer of latex' at the right thickness. * * * As in the case of Hadfield's patent, we should have to be satisfied that the Dutch machine had been widely known in the art; a most unlikely possibility."

No two peas are more nearly alike.

Respondents would like to forget that the Trial Court had no doubt as to validity; and that the Court of Appeals could find nothing wrong with the Trial Court's findings of fact and simply ignored them, in violation of Rule 52 (a) while creating a new rule on which to base the decision of invalidity.

Petitioner insists that the ground cited in the Petition for Rehearing was a ground *not previously presented.* The previously presented grounds were conflicts between different Courts of Appeals on the same matter (Petition, pp. 6, 7 and 16) and the substitution of "an inventor" for the "mechanic skilled in the art," a variation of Rule 52 (a) and disregard of the history test (Petition, pp. 18, 20 and 23). None of those grounds was even remotely like the ground presented in the Petition for Rehearing.

Respondents' assertion that the present ground was previously asserted is evidently based on a failure to distinguish between a new ground and evidence supporting

a ground. Obviously the same facts may support more than one ground.

The Petition for Rehearing should be granted.

Respectfully submitted,

BLYTHE D. WATTS,
MORRIS HIRSCH,
Counsel for Petitioner.

GEORGE H. DESSION,
Of Counsel.

Dated: Cleveland, Ohio,
Nov. 21, 1951.